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HAROLD B. WILLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 726

THE ORDER OF RAILROAD TELEGRAPHERS, *Petitioner*,

v.

NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, DEBTOR, GUY A. THOMPSON, TRUSTEE, *Respondent*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, DEBTOR, GUY A. THOMPSON, TRUSTEE, *Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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The Order of Railroad Telegraphers prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on January 10, 1956.

### OPINIONS BELOW

The opinion of the District Court, its Findings of Fact, and its Conclusions of Law are in the record.

R. 17, 21, 25. The opinion of the Court of Appeals (App. 1a), has not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1956. The jurisdiction of this Court is invoked under section 1254(a) of Title 28, United States Code.

## QUESTIONS PRESENTED

1. Whether, under section 3, First, (j) of the Railway Labor Act (45 U.S.C., sec. 153, First, (j)), providing that the National Railroad Adjustment Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes", in a dispute arising from a claim that a carrier has violated a collective bargaining agreement by assigning work contrary to the provisions of the agreement, notice is required to persons who are neither claimants nor carriers and are not parties to or governed by the collective bargaining agreement.

2. Whether, in the event the answer to question 1 is in the affirmative, actual knowledge of the proceeding by the others allegedly required to be given notice satisfies such requirement.

3. Whether, in the event the answer to question 1 is in the affirmative, failure to give such notice renders any award void.

4. Whether, in the event the answer to question 1 is in the affirmative, the carrier, which is given notice, may challenge the validity of the award for lack of notice to others.

5. Whether, in the situation posed in question 1, in a suit under section 3, First, (p) of the Railway Labor Act, to enforce an award of the Adjustment Board, there are any indispensable parties other than the parties to the submission before the Adjustment Board.

## STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U.S.C., §§ 151 et seq.) are set forth in the appendix.

## STATEMENT

This action was brought by The Order of Railroad Telegraphers (hereinafter referred to as the "Telegraphers") against the respondent railroad (hereinafter referred to as the "Carrier") to enforce an award and order of the National Railroad Adjustment Board. (R. 4.) Such action is a special statutory proceeding specifically provided for by section 3, First, (p) of the Railway Labor Act as amended (Act of June 21, 1934, c. 691, sec. 3, 48 Stat. 1189; U.S.C., Tit. 45, sec. 153, First, (p)).

Telegraphers organization is the duly authorized collective bargaining representative under the Railway Labor Act of the class or craft of employees commonly known as "Telegraphers" employed by the Carrier. (R. 21.) In such capacity it filed a claim with the National Railroad Adjustment Board, Third Division, that certain work at Anchorage, Louisiana, subject to the collective bargaining agreements between the Telegraphers and the Carrier, had been assigned by the Carrier other than as provided in such agreements. This claim resulted in Award 4734 of the Board, dated February 28, 1950, sustaining the Telegraphers' claim,

and an accompanying order directing the Carrier to make the award effective. (R. 7, 10; Exh. A to Complaint following R. 8.) The Carrier refused to comply with the award and order of the Board, and this suit was brought. (R. 7, 10.)

There was no dispute concerning the material facts, which were established by the Complaint (R. 4), the Amended Answer (R. 9), pretrial proceedings (R. 15), and a subsequent stipulation (R. 16). The Amended Answer set forth several affirmative defenses only one of which was passed upon by the District Court. The substance of this defense, which was sustained by that Court, was that the award and order of the Board upon which the suit was predicated were invalid for failure of the Board to give notice and opportunity to be heard in its proceedings to another labor organization, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the "Clerks"). (R. 11, 17, 26.)

This case, and the Telegraphers' claim giving rise to it, are sequels to the decision of the court below in *Order of Railroad Telegraphers* v. *New Orleans, T. & M. R. Co.*, 156 F. 2d 1 (1946), affirming 61 F. Supp. 869. (R. 16.) The basic issue in this case is best seen in such context. The following facts are established by the opinion of the court below in the prior case and by Award No. 4734 (Exh. A to Complaint, following R. 8):

For many years prior to 1948 the Carrier maintained four positions under the Telegraphers' agreement at Anchorage, Louisiana. In 1943 the Clerks filed a group of claims with the Third Division of the Adjustment Board contending that the assignment of clerical

work to positions covered by the Telegraphers' agreement violated the terms of the collective bargaining agreements between the Carrier and the Clerks. When these claims were pending before the Board the Telegraphers sought to intervene and be heard before the Board in order to protect their right to perform such work under their agreement. The Board denied intervention and opportunity to be heard on the part of the Telegraphers on the ground that it had jurisdiction only to adjudicate the dispute between the Clerks and the Carrier as to the interpretation and application of the Clerks' agreement, a matter in which the Telegraphers were not involved. The Clerks' claims resulted in Award Numbers 2253 to 2258, inclusive, sustaining the claims.

The Telegraphers thereupon brought suit in the United States District Court for the Eastern District of Missouri against the Carrier and the Clerks, contending in Count II of the Petition that the Awards sustaining the Clerks' claims were invalid because rendered without opportunity to the Telegraphers to be heard in the proceeding, and therefore seeking to enjoin the Carrier and the Clerks from putting the Awards into effect. The District Court denied relief and dismissed the Complaint, approving the reasoning of the Adjustment Board to the effect that any showing the Telegraphers might have been able to make that their agreement covered the work in question would not govern the interpretation of the Clerks' agreement, the only question before the Board and within its jurisdiction. Upon appeal the Court of Appeals likewise approved the reasoning of the District Court and of the Adjustment Board. That Court further said: "Even though the ORT were not permitted to inter-

vene in the proceedings brought by the BRC involving its contract with the carriers, it still has a right under the Act to commence a proceeding against the carriers and to obtain an order of the Adjustment Board, interpreting and applying its own contract with them." However, in light of what this Court had said in *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, the Court of Appeals vacated the judgment of dismissal and instructed the District Court to stay its decision until a reasonable opportunity was given for an application to the Adjustment Board for an interpretation of the Telegraphers' agreement.

As of that time the Telegraphers had no grievance nor any dispute with the Carrier as to the proper interpretation and application of the Telegraphers' agreement. Employees subject to the Telegraphers' agreement were continuing to perform the work in question and the Carrier continued its refusal to put Awards Numbers 2253 to 2258, inclusive, into effect. Consequently no claim was or could be submitted to the Adjustment Board at that time involving the Telegraphers' agreement. Thereafter, on June 22, 1947, the District Court entered an order finally dismissing the case.

For some time thereafter the Carrier continued to apply the Telegraphers' agreement as it had theretofore been applied and did not make Awards Numbers 2253 to 2258, inclusive, effective. However, on February 23, 1948, in the course of putting those Awards into effect the Carrier unilaterally reclassified the position of star (*) agent at Anchorage, Louisiana, to agent-telegrapher, removed from that position all the clerical work formerly performed therein and assigned it to a

newly created position of cashier covered by the Clerks' agreement; at the same time it abolished the first trick telegrapher-clerk's position and assigned the work of that position to the reclassified position of agent-telegrapher.

These actions, the Telegraphers claimed, violated the terms of the collective bargaining agreements between the Carrier and the Telegraphers. Failing to secure adjustment of this claim through handling on the property the claim was submitted to the Third Division of the Adjustment Board. The Board was fully informed as to the prior history, including the rendition of Awards Numbers 2253 to 2258, inclusive, holding the clerical work in question to be covered by the Clerks' agreement, and the prior litigation pertaining thereto. The Board concluded, upon examination of the agreements between the Carrier and the Telegraphers, that the Carrier's action had violated those agreements and directed that the position of the star (*) agent and the position of first trick telegrapher at Anchorage be restored under the Telegraphers' agreement and that all employees adversely affected by the violation of the agreements be restored to their former positions and be reimbursed for compensation lost through the violation, not, however, including the expenses claimed. This was Award Number 4734; when the Carrier refused to comply with the order of the Board to make it effective this suit was brought.

It is stipulated (R. 16) that during the pendency of the proceedings before the Adjustment Board the Board gave no notice to the Clerks' organization or to any members thereof respecting the pendency of the Telegraphers' claim; that neither the Telegraphers nor

the Carrier requested the Board to give such notice; that the Clerks did have actual knowledge of the pendency of the proceedings and did not ask leave to intervene or otherwise appear therein; and that it was not the policy or practice of the Board to permit persons or organizations whose relationship to the controversy was like that of the Clerks' organization or the employees represented by it to intervene or to notify them of the pendency or hearing of such proceedings before the Board.

## SPECIFICATION OF ERRORS TO BE URGED

The Court below erred

1. In holding that Award 4734 in favor of the Telegraphers was invalid and unenforceable because notice of the Adjustment Board proceedings had not been given to the Clerks.

2. In failing to hold that any requirement of notice to the Clerks concerning the Adjustment Board proceedings was satisfied by the Clerks' actual knowledge of the proceedings.

3. In holding that the Clerks were indispensable parties to the action to enforce the Award and Order of the Adjustment Board.

## REASONS FOR GRANTING THE WRIT

The issue underlying all the questions presented in this case is the same as the basic issue in *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366, 370, in which case this Court granted certiorari. In that case, this Court found the basic issue "a perplexing problem" (p. 370) raising "perplexing questions." (P. 372.) However, "their difficulty" admonished this Court "to

observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." (Pp. 372-3.) In the *Whitehouse* case, this Court therefore reversed the lower Court for error in deciding less contentious issues.

Here we have the same basic issue, raising the same "serious questions concerning the administration of the Railway Labor Act", but this time presented more nakedly. Here, every question presented involves the basic issue: in the situation presented both here and in the *Whitehouse* case, were the Clerks "employees involved" within the meaning of section 3, First (j) of the Railway Labor Act? That issue has given rise to considerable litigation, and its lack of definitive resolution has resulted in considerable turmoil and administrative frustration.

This case and its antecedent proceedings accentuate the confusion of the lower courts concerning the functioning of the Railway Labor Act, the inconsistency of the rulings below, and the necessity of a definitive interpretation of section 3, First, (j) of the Railway Labor Act.

When the claim of the Clerks, that certain work had improperly been assigned by being assigned other than as provided in the Clerks' agreement, was pending before the Adjustment Board, the Telegraphers sought to intervene in the proceedings before the Board because the work in question was being performed as part of a position under the Telegraphers' agreement. Intervention was denied, and both courts below held that not only were the Telegraphers not a necessary party to the Clerks proceeding but that they could not

properly be permitted to become a party. *Order of R. Tel.* v. *N. O. T. & M. R. Co.,* 61 F. Supp. 869, affd. 156 F. 2d 1. Yet when the Telegraphers submitted a claim to the Board alleging that the identical work was improperly assigned because assigned other than as provided in the Telegraphers' agreement, the same courts held the resulting award to be void because the Clerks had not been given opportunity to participate in the proceeding, and that a suit to enforce the award was defective because the Clerks were indispensable parties and had not been joined.

The confusion of the Court below is shown further by its ruling in the earlier proceeding that the proper procedure was for the Telegraphers to submit to the Adjustment Board the question whether its contract covered the work. Such a procedure was impossible under the Railway Labor Act. That Act provides for parties to submit to the Board disputes between railroads and employees. At that time there was no dispute between the Telegraphers and the Carrier, for the Telegraphers contended the work was governed by its contract, and the Carrier agreed and assigned the work accordingly. It was impossible in such situation for the Telegraphers "to commence a proceeding against the carriers." App. 13a.

With respect to the issue of whether, assuming that in the situation involved here the Act required notice to the Clerks, such requirement was satisfied by the Clerks having actual knowledge of the proceedings, the decisions of the Courts of Appeals are in conflict. In *Estes* v. *Union Terminal,* 89 F. 2d 768 (8th Cir.. 1937); *Hunter* v. *A. T. & S. F. Ry. Co.,* 188 F. 2d 294 (7th Cir., 1951), cert. den. 342 U. S. 819, reh. den. 342 U. S. 889;

and *Kirby* v. *Penna. R. Co.,* 188 F. 2d 793 (3d Cir., 1951), the Courts of Appeals for the Third, Seventh, and Eighth Circuits held that where notice to third parties of a claim before the Adjustment Board was required, such requirement was satisfied if the third parties had actual knowledge of the proceeding. In the *Whitehouse* case, the Court of Appeals for the Seventh Circuit held that the existence of a policy of the Board, of which the Court was theretofore unaware, not to permit parties to appear before it who had not had formal notice, required a contrary holding. On review in that case, this Court did not reach that issue. In this case, although the point was briefed and argued below, the Court below does not directly discuss it, although the result is the same as though it agreed with the Court of Appeals for the Seventh Circuit. It is difficult to understand how the existence of a policy, as distinguished from its application, can constitute reversible error. See *United States* v. *L. A. Tucker Truck Lines,* 344 U.S. 33; *Yakus* v. *United States,* 321 U.S. 414, 434, 436.

The confusion of the various courts has resulted in frustrating the operation of the Railway Labor Act in this type of situation. There has been frequent resort to the courts over this procedural question without any definitive ruling. Many such cases are now pending in various federal courts. Many more claims of this type are pending before the Adjustment Board with little hope of disposition until the basic question in this case is finally resolved. And an unknown but very large number of claims are not submitted to the Board because of uncertainty over this question, and thus remain as unsettled grievances and sources of friction between unions and railroads. The result is turmoil when a dis-

pute of this nature arises. It is important to the administration of the Railway Labor Act that this question be resolved.

## CONCLUSION

The basic issue in this case is the same as the basic issue in *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366, but which this Court found it unnecessary to resolve in disposing of the *Whitehouse* case. The lack of definitive resolution of that issue has resulted in a multiplicity of lawsuits and the frustration of the functioning of the Railway Labor Act with respect to certain types of claims submitted to the National Railroad Adjustment Board. A resolution of that issue is necessary if the Railway Labor Act is to function as Congress intended.

Respectfully submitted,

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# APPENDIX

## APPENDIX

### Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 15,177.

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Appeal from the United States District Court for the Eastern District of Missouri

THE ORDER OF RAILROAD TELEGRAPHERS, *Appellant,*

v.

NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Debtor,*
GUY A. THOMPSON, Trustee, *Appellee.*

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[January 10, 1956.]

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Milton Kramer (George A. McNulty and Lester P. Schoene were on the brief), for Appellant.

Thomas T. Railey for Appellee.

Carroll J. Donohue, Clarence M. Mulholland, and Edward J. Hickey, Jr., filed brief for Railway Labor Executives Association, et al., as Amici Curiae.

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Before GARDNER, Chief Judge, and WOODROUGH and VOGEL, Circuit Judges.

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WOODROUGH, Circuit Judge.

This suit was brought in the District Court by the Order of Railroad Telegraphers, here called Telegraphers, under

authority of 45 U.S.C. Sec. 153 First (p) to obtain enforcement of Award No. 4734 rendered in their favor against the railroad by the National Railroad Adjustment Board, Third Division, on February 28, 1950 and not complied with by the railroad. The Award sustained a claim filed by the Telegraphers against the railroad and its trustee (here called carrier) to the effect that the carrier violated its collective bargaining agreements with the Telegraphers by assigning work covered by such agreements then being done by Telegraphers to members of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (here called Clerks) and that the carrier should restore the displaced Telegraphers to their former positions and reimburse them.[1]

The defendant carrier pleaded in its amended answer as its second affirmative defense that the Award No. 4734

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[1] Statement of Claims Sustained by Award No. 4734: Claim of the General Committee of the Order of Railroad Telegraphers on the Missouri Pacific Lines in Texas and Louisiana,

(a) That the Carrier violated the prevailing telegraphers' agreement dated October 15, 1940, particularly the Scope Rule and Rule 24(a) thereof, and also violated the provisions of the Memorandum of Understanding between the parties to this dispute dated April 22, 1941, when on February 28, 1948, the Carrier, acting alone, reclassified the position of star (*) agent at Anchorage, La., to agent-telegrapher, and removed from the agreement and from said agent all of the clerical work formerly performed by him and assigned all of said clerical work to a newly created position of cashier not under the telegraphers' agreement.

(b) That the Carrier violated the terms of the prevailing telegraphers' agreement when, acting alone, it discontinued the position of first trick telegrapher-clerk at Anchorage, La., and assigned all of the work of the position to the improperly reclassified position of agent-telegrapher.

(c) That the position of star (*) agent and the position of first trick telegrapher-clerk at Anchorage shall be restored to the telegraphers' agreement and all employees adversely affectd by these violative acts of the Carrier shall be restored to their former positions and be reimbursed for the difference between what they have earned and their full compensation lost, and in addition they shall be paid for any expenses incurred by reason of the Carrier's acts recited above.

sought to be enforced was void and unenforceable because the Adjustment Board failed to comply with the requirements of 45 U.S.C. Sec. 153 First (j) that "the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them." Defendant alleged that the Clerks then performing the work claimed by the Telegraphers being adversely affected by the Telegraphers' claim of right to the same work were "employees involved in the dispute" and were indispensable parties necessary to be notified and given an opportunity to be heard in the proceedings before the Adjustment Board and the right was denied them. It was also alleged that the Award was "unenforceable for want of indispensable parties in this pending court proceeding."[2]

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2 Second Affirmative Defense.

16. Defendant avers that the suit at bar and the claim in question asserted before the Adjustment Board involves a jurisdictional controversy wherein plaintiff claims jurisdiction over certain clerical work now performed by a cashier at Anchorage, Louisiana, as a member of the craft for which the clerk's organization is the duly accredited representative with authority to represent its members in proceedings of this kind and that the clerks' organization and/or its members adversely affected by the claim of the Telegraphers are indispensable parties defendant and were necessary parties to be notified and given an opportunity to be heard in the proceedings before the Adjustment Board. Defendant avers that the Board gave no notice to the clerks' organization, or any member thereof, respecting the pendency or hearing of the Telegraphers' claim in question with opportunity to be heard, and in no way undertook to carry out the requirements of Section 3 First (j) of the Railway Labor Act; that on information and belief, the Clerks did have actual knowledge of the pendency of the controversy more specifically described in the award now sought to be enforced and of the pendency of the proceedings before the Board, but at the time the Adjustment Board considered the claim at bar and handed down Award No. 4734, February 28, 1950, and prior to a change in the Board's practices announced in Award No. 5432 handed down September 6, 1951, it was not the policy or practice of the Third Division of the Adjustment Board to notify claimants or their accredited representatives of the pendency of adverse claims of other crafts affecting their rights, or to notify them of hearings thereon, or permit them to be heard. Defendant therefore avers

On the trial of the case before the Court without a jury, there was no material dispute as to the facts which were established through the pleadings which included a complete record of the proceedings before the Adjustment Board and its award; by pretrial proceedings and by stipulations and the court sustained the second affirmative defense asserted by defendant[3] and entered judgment for defendant dismissing the case with costs made payable as prescribed by 45 U.S.C. Sec. 153 First (g). The judgment was accompanied by Opinion, Findings of Fact and Conclusions of Law (to be reported).

The Court recited in its opinion that:

"In 1943 the Brotherhood of Railway and Steamship Clerks (hereinafter referred to as BRS) obtained an award and order 2254[4] by the National Railroad Adjustment

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that the award of the Adjustment Board here sought to be enforced is void and unenforceable because of the failure of the Adjustment Board to comply with the mandatory requirements of Section 3 First (j) of the Railway Labor Act and that said award is unenforceable for want of indispensable parties in this pending court proceeding.

[3] Except that it made no reference to the allegation that the clerks were indispensable parties defendant in this pending court proceeding.

[4]

Award No. 2254
Docket No. CL-2163

National Railroad Adjustment Board
Third Division
H. Nathan Swaim, Referee.

Parties to Dispute:

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

Gulf Coast Lines, International-Great Northern Railroad Company, San Antonio, Uvalde & Gulf Railroad Company, Sugarland Railway Company, Asherton & Gulf Railway Company (Guy A. Thompson, Trustee).

Statement of Claim: Claim of the System Committee of the Brotherhood that:

(a) The Carrier is violating the Clerks' Agreement at Anchor-

Board, which held that the carrier was violating the Clerks' Agreement at Anchorage, Louisiana, with respect to the assignment of work. The plaintiff in this Court filed suit to declare Award 2254 invalid, to enjoin the enforcement of the award and to declare the contract between BRS and the carrier upon which Award 2254 was based void, and to enjoin enforcement of the contract. The injunctive relief sought was denied (156 F. 2d 1) but the Court of Appeals held that the decision of the District Court dismissing the petition (61 F. Supp. 869) be stayed until an opportunity was given plaintiff for application to the Railroad Adjustment Board for interpretation of the plaintiff's agreement. The plaintiff chose not to file an application with the Board and its suit was dismissed with prejudice. Subsequent to the dismissal of the suit after the members of BRS had

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age, Louisiana, by requiring or permitting employes who are not covered by the Clerks' Agreement to perform work that is covered by the Clerks' agreement. Also

(b) Claim that the Carrier be required to assign the work here involved to employes who hold seniority rights and work under the Clerks' Agreement.

(Statement of "Position of Employes" and "Position of Carriers" not here quoted.)

Opinion of the Board: This award is controlled by the decision in Docket CL-2162, Award No. 2253, in which the essential facts were the same. The contentions and principles were there fully considered and for the reasons therein stated, this claim must be sustained.

Findings: The Third Division of the Adjustment Board, upon the whole record and all the evidence finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the agreement as stated in the claim.

Award.

The claim is sustained as to (a) and (b).

National Railroad Adjustment Board
By Order of the Third Division.

taken over the work in accordance with Award 2254, which the plaintiff's members formerly performed, the plaintiff sought interpretation of its contract by the Railroad Adjustment Board which resulted in the award and order 4734, sustaining the plaintiff's interpretation of its contract awarding its members the work, which award and order is sought to be enforced in this suit.

"Simply stated, the BRS [Clerks] contract with the carrier and the plaintiff's contract with the carrier overlapped. Both contracts proposed to cover the same work at Anchorage, Louisiana, and the National Railroad Adjustment Board has sustained both BRS and the plaintiff in their interpretation of their respective contracts with respect to the work in question. Award 2254 was entered without the plaintiff being a party to the hearing and Award 4734 was entered without BRS being a party to the hearing: * * *."

The Court observed that this Court in *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527, in dealing with an award where a somewhat similar situation to the one presented here was involved, approved conclusions of law by the District Court, l.c. 534, as follows:

"That the aforesaid awards of the National Railroad Adjustment Board, First Division, are illegal and void, in that they were rendered by said Board in violation of Section 3 (j) Title 45, U.S.C.A., Section 153 (j) of the Railway Labor Act, because plaintiff and the members of the class whom he represents involved in said proceedings, were given no notice thereof, or afforded an opportunity to be heard therein, either in person or by counsel.

"Compliance by the Santa Fe with the provisions of said awards deprives plaintiff and the class he represents of property rights without due process of law, in violation of the Fifth Amendment to the Constitution of the United States."

The trial Court also noted that this Court in approving the District Court's conclusions of law referred to above cites [and indicates that its is in accord with] *Hunter* v. *Atchison, Topeka and Santa Fe Railway,* 171 F. 2d 594, where in the Court of Appeals for the Seventh Circuit held a similarly obtained award to be void. The case of *Missouri, Kansas and Texas R. Co.* v. *Brotherhood of Ry. & S.S. Clerks,* 188 F. 2d 302, was also cited. The Court there was concerned with an appeal from an injunction issued by the District Court temporarily enjoining the Clerks from prosecuting any suit to enforce awards entered in their favor by the National Railroad Adjustment Board. The carrier brought the action because awards had been entered in favor of both the Clerks and the Telegraphers covering the same jobs in the interpretation of their respective contracts. The trial Court quoted from the Seventh Circuit opinion upholding the granting of temporary injunction as follows:

"The dilemma here posed results in a large part from the refusal of the Board to bring both groups of claimants before it in one proceeding. Judging from a number of opinion accompanying awards and orders which were introduced in evidence in this cause, it appears to have been generally assumed that the Board has no authority under the Act to consider two agreements simultaneously, each in the light of the other. However, we are convinced from our examination of the Act that it does not require such construction. It has been stated that the rules of the Board which it is authorized to promulgate under Section 3 First (u) forbid such procedure. However, we have been cited no such rule and doubt its existence in view of the fact that it appears that the Board itself has generally deadlocked on the question, with the carrier members consistently upholding the view that where a claim is filed against a carrier by a labor group contemplating the ousting of other employees in favor of the claimant, those other employees sought to be ousted have a vital interest in the proceedings

and under Section 3, First (j) of the Act, a right to notice and opportunity to participate in the hearing before the Board. The labor members have with equal consistency denied this contention. We think logic and reason support the carrier's construction of Sec. 3, First (j), which provides that the Board shall give due notice of all hearings 'to the employee or employees and to the carrier or carriers involved in any disputes submitted to them.' We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees.

"Obviously it is desirable to settle controversies such as these involving so-called 'overlapping contracts' on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by Sec. 6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier."

The trial Court noted further that the Court of Appeals for the Seventh Circuit had reiterated in *Illinois Central R. Co.* v. *Whitehouse*, 212 F. 2d 22, and *Allain* v. *Tummon*, et al., 212 F. 2d. 32, that an award made by the Board in the absence of due notice to the involved parties with an opportunity accorded to be heard is void and enjoined its enforcement for that reason.

The trial Court accordingly declared in its opinion in this case that "The award and order of the National Railroad Adjustment Board 4734 is illegal and void in that it was rendered by said Board without giving members of BRS notice and without the members of BRS having an opportunity in the hearing to be heard before the National Railroad Adjustment Board."

The conclusions of law declared by the District Court were as follows:

"1. The intent and purpose of former Award No. 2254 in favor of the Clerks was to give the disputed clerical work at the station of Anchorage to members of the Clerks' organization. The intent and purpose of the subsequent Award No. 4734 of the same division of the Adjustment Board now under consideration was to give the same disputed clerical work at the station at Anchorage to the members of the Telegraphers' organization. Both organizations claimed the clerical work in controversy and not merely pay for the work performed.

The carrier has a right to abolish any position in the agreement provided the duties of the position are in fact abolished. The giving of the clerical work to the Clerks under Award 2254 of necessity took that work away from the Telegraphers. To now give the disputed clerical work to the Telegraphers under authority of Award No. 4734 will of necessity take that work away from a member of the Clerks' organization who is now performing the clerical work as Cashier at the station of Anchorage. The controversy now before the Court therefore involves conflicting claims of the Clerks and the Telegraphers to the same clerical work. The Clerks are involved in the dispute as that term is used in Section 3, First (j) of the Railway Labor Act.

"2. Even if it be held that Award No. 4734 now under consideration does not involve a jurisdictional controversy, but merely the interpretation of a labor agreement between the Telegraphers and the Carrier, the Clerks are nevertheless involved in the dispute for as stated in *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 567, (90 L.Ed. 318, 323):

> "* * * interpretation of these contracts involves more than a mere construction of a 'document' in

terms of ordinary meaning of words and their position. * * * For O.R.C.'s agreement with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that, too must be taken into account and properly understood."

"3. The Railway Labor Act specifically provides that 'the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers *involved in any disputes* submitted to them.' (Title 45, U.S.C. Sec. 153, First, (j).) The Board did not comply with this requirement of the Act, and it has been stipulated in this case that it was not the policy or practice of the Third Division of the Adjustment Board to permit persons or organizations whose relationship to the controversy was like that of the Clerks' organization or the employes represented by it to intervene or to notify them of the pendency or hearing of such proceedings before the Board. Neither formal notice or actual knowledge, without opportunity to be heard, fulfills the purpose of the statute. Award No. 4734 is therefore unenforceable for the reasons more fully stated in *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 Fed. (2) 527; *Hunter* v. *Atchison, Topeka and Santa Fe Railway*, 171 Fed. (2) 594; *Missouri-Kansas-Texas R. Co. et al.* v. *Brotherhood of Ry. and S.S. Clerks, et al.*, 188 Fed. (2) 302; *Illinois Central R. Co.* v. *Whitehouse*, 212 Fed. (2) 22; and *Allain* v. *Tummon, et al.*, 212 Fed. (2) 32.

"4. In view of the ruling on defendant's 'Second Affirmative Defense', the Court withholds ruling upon the other questions involved."

It is contended for the Telegraphers, appellant in this appeal, that the decision of the District Court was erroneous in that it was contrary to the decision of this Court in *Order of Railroad Telegraphers* v. *New Orleans, T. & M. R.*

*Co.*, 156 F. 2d 1, and that it failed to follow the "clear guide to decision" presented by the Supreme Court in *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366 (June 6, 1955). It is argued that our decision in *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527, may be distinguished and that the principles established by this Court in its earlier decision in the *New Orleans, T. & M.* case "are in accord with the intent of Congress * * * and those adopted by the Court of Appeals for the Seventh Circuit are contrary thereto."

The distinction which the appellant here seeks to draw between this case and the *Templeton* case is that in this case both the Clerks and the Telegraphers have "contracts or agreements" with the railroad whereas *Templeton's* class of employees held their jobs at the will of the railroad which employed them and the railroad was wrongfully coerced by the Brotherhood of Railroad Trainmen and the awards obtained by them. But that difference had no part in determining the decision of the *Templeton* case either in the trial court or in this court. We found in the *Templeton* case that the award obtained by the Trainmen purporting to take away the jobs of the messenger-baggagemen was illegal and void for want of opportunity afforded the baggagemen to be heard and we think that the same defect has been shown in respect to the award sought to be enforced in this case. The trial Court was not in error in holding that our decision in the *Templeton* case was applicable to and controlling in this case.

Nor do we find that the recent decision of the Supreme Court in *Whitehouse* v. *Illinois Central R. Co.*, supra, should lead to a reversal in the present case. In the *Whitehouse* case the railroad sought temporary and permanent injunctions directing the National Railroad Adjustment Board to issue notice to the Clerks and their member Shears, of the proceedings brought before the Board by the Telegraphers to obtain an award assigning to them positions that were being filled under claim of contract

rights by Clerks and restraining the Board from proceeding with any disposition of Telegraphers' claim until such notice was given. The District Court issued a preliminary injunction restraining the Board from proceeding further in the matter unless notice was given to Clerks and their member Shears and the Court of Appeals for the Seventh Circuit affirmed.

The Supreme Court, reviewing the judgment on certiorari, stated that it "had been urged to resolve the present dispute regarding the requirement of notice to persons not formal parties to a submission to the Board, a dispute which had resulted in numerous conflicting decisions by the Board." It observed "This remains a perplexing problem despite the substantial agreement among Courts of Appeals which have considered the question in holding that notice is required to other persons in varying situations." The cases are referred to in a footnote (3).

But despite the urging, the Supreme Court chose to stay within "the wise limitations on our function" and confined itself "to deciding only what is necessary to the disposition of the immediate case." It observed that "Railroad's resort to the Courts has preceded any award and one may be rendered which could occasion no possible injury to it." By divided Court it simply reversed the decree of injunction on the ground that prior to any proceedings brought by Telegraphers before the Board, "the injuries are too speculative to warrant resort to extraordinary remedies." The Court declined to adjudicate upon the merits of the controversy.

The result of the decision in the *Whitehouse* case therefore is exactly the same result that was reached by this Court and the District Court in the case of *Order of Railroad Telegraphers* v. *New Orleans, T. & M. R. Co.*, supra, upon which the appellant is placing its reliance here. In the latter case the suit was between the same parties involved here. The Telegraphers were plaintiffs and sought

to obtain declaratory judgment and injunctive relief against the enforcement of the awards made by the National Railroad Adjustment Board in favor of the Clerks including Awards No. 2253 to 2258. The Telegraphers' complaint was in two counts. In the first count they sought injunctive relief avoiding a certain contract between the carriers and the Clerks purporting to control clerical work being performed by the Telegraphers. In the second they sought injunctive relief against the enforcement of the awards that had been entered by the Board in favor of the Clerks concerning the same work.

On appeal of the case to this Court we held that the Order of Railroad Telegraphers had "the right under the Act [Railway Labor Act, 45 U.S.C.A. Sec. 151 et seq.] to commence a proceeding against the carriers and to obtain an order of the Adjustment Board interpreting and applying its own contract with them." And that "Until that step has been taken, the Court cannot determine whether a wrong has been done calling for the intervention of a court of equity. * * *."

Although this Court vacated the judgment of dismissal and remanded the case with direction to stay decision therein, it determined as effectually as did the Supreme Court in the *Whtehouse* case that the suit of the Telegraphers was prematurely brought and therefore presented no ground for relief in equity. Both counts of the complaint were dismissed with no adjudication on the merits.

It is true that this Court did not mark off the boundary line of its adjudication in the *New Orleans, T. & M. R.* case as precisely as did the Supreme Court in the *Whitehouse* case. Though we held the action to be prematurely brought and therefore made no ruling on the merits, we did discuss provisions of the Railway Labor Act and considered and quoted from the decisions of the Supreme Court in *General Committee* v. *M. K. & T. R. Co.*, 320 U.S. 323 and *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, but the ad-

judication made does not establish a precedent controlling decision in the present case.

We hold that the trial Court was not in error in applying *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527; *Hunter* v. *Atchison, Topeka & Santa Fe Railway*, 171 F. 2d 594; *Missouri-Kansas-Texas R. Co., et al.* v. *Brotherhood of Ry. and S.S. Clerks, et al.*, 188 F. 2d 302; *Illinois Central R. Co.* v. *Whitehouse*, 212 F. 2d 22; and *Allain* v. *Tummon, et al.*, 212 F. 2d 32, or in its conclusions and that the judgment of dismissal appealed from must be sustained on the grounds stated by the trial Court.

It is contended here for the carrier appellee that the judgment of dismissal appealed from should be sustained on the further ground, not passed on below, "that said Award [No. 4734] is unenforceable for want of indispensable parties in this pending court proceeding."

The point has been briefed for the parties pro and con and we express our conclusion that the contention should be sustained. Enforcement of Award No. 4734 prayed for in the plaintiff's complaint in this suit would necessarily include the issuance by the Federal Court of a mandate requiring the defendant carrier to dispossess a clerk now in its employ of his job. The Clerks' claim of right to the job has been determined by an Award of the Board and his interest in the suit to dispossess him of it is real and obvious. Yet neither he nor his union has been made a party to this suit and the object of the suit is to have the Court dispossess him without hearing him.

The subsection (p) under which this action was brought provides "Such suit in the District Court shall proceed in all respects as other civil suits * * *" (with certain exceptions not here relevant.) It is well settled that a Federal Court will not proceed to final decision of a controversy brought before it without the presence of all "who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a

condition that its final determination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow*, 58 U.S. 129, l.c. 139; *Wesson* v. *Crain*, 8th Cir., 165 F. 2d 6, l.c. 9, and cases cited. Rule 19 of the Rules of Civil Procedure has not modified the requirement as to indispensable parties. *Wesson* v. *Crain*, supra, and the undisputed facts in this case demonstrate that the Clerks are indispensable parties without whose presence justice cannot be done.

It is argued for the carrier that in consequence of the indispensability of the Clerks to a just determination of the complaint herein and the consequent duty of the plaintiff to bring them in as parties, the controversy between the Telegraphers and the Clerks as to the right to the jobs in question becomes justiciable. We confine our decision on the question of necessary parties to the holding that the judgment of dismissal of the plaintiff's case was justified by the lack of indispensable parties defendant, to-wit, Clerks:

A brief for the American Train Dispatchers Association and many other railroad labor unions, representing approximately a million railroad employees, as amici curiae was filed in this case similar in substance to the brief of the same parties by the same counsel filed in the Supreme Court in the *Whitehouse* case. The brief is in opposition to any determination that the jurisdictional dispute between the Telegraphers and Clerks is or many become justiciable by the Federal Courts and has been fully considered.

Affirmed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

**Statutory Provisions Involved**

*Railway Labor Act* (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 926), 45 U.S.C. ch. 8; U.S.C.A., Title 45, secs. 151 et seq.

Section 2, Seventh:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 2, Tenth:

> "The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment for each offense, * * *."

Section 3, (h):

> "The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> "First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

Section 3, (i):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this man-

ner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 3, (j):

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Section 3, (p):

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit is such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are em-

powered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Section 3, (q):

"All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Section 6:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * *."

MAR 1 2 1956
HAROLD B. WILLEY, C

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 726.

THE ORDER OF RAILROAD TELEGRAPHERS,
Petitioner,

vs.

NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY,
Debtor, GUY A. THOMPSON, Trustee,
Respondent.

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### MOTION FOR SUBSTITUTION.

Effective March 1, 1956, the reorganized Missouri Pacific Railroad Company succeeded to all rights and liabilities of Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Debtor. Missouri Pacific Railroad Company therefore requests and consents that it be substituted as respondent.

### STATEMENT.

The decision of the Eighth Circuit sought to be reviewed grows out of a proceeding to enforce Award No. 4734 of the National Railroad Adjustment Board, Third Division. The award will be found following page 8 in the printed record.

The issues entering into the lower Court's determination of this case were not particularly complicated or perplexing. They involved a factual finding, amply supported by evidence, to the effect that the Telegraphers were seeking to take certain clerical work away from the Clerks, and a finding of law that the Clerks under such circumstances were "involved" parties before the Adjustment Board and were "indispensable parties" in the Court action to enforce the award. The findings of the District Court which were approved by the Court of Appeals are in part as follows (Rec. p. 25; Appendix to Petitioner's Brief, p. 9a):

> "The intent and purpose of former Award No. 2254 in favor of the Clerks was to give the disputed clerical work at the station of Anchorage to members of the Clerks' organization. The intent and purpose of the subsequent Award No. 4734 of the same division of the Adjustment Board now under consideration was to give the same disputed clerical work at the station at Anchorage to the members of the Telegraphers' organization. Both organizations claimed the clerical work in controversy and not merely pay for the work performed. * * * The giving of the clerical work to the Clerks under Award 2254 of necessity took that work away from the Telegraphers. To now give the disputed clerical work to the Telegraphers under authority of Award No. 4734 will of necessity take that work away from a member of the Clerks' organization who is now performing the clerical work as Cashier at the station of Anchorage. The controversy now before the Court therefore involves conflicting claims of the Clerks and the Telegraphers to the same clerical work. The Clerks are involved in the dispute as that term is used in Section 3, First (j) of the Railway Labor Act."

The Court of Appeals not only sustained this finding, but also found that in the Court action to enforce the award, the clerks were indispensable parties, and that the

refusal of the Telegraphers to bring in the Clerks as indispensable parties (R. p. 15) constituted an additional ground for the dismissal of the case (Appendix to Petitioner's Brief, p. 14a).

It has been stipulated in the case at bar that at the time the Adjustment Board handed down Award No. 4734, February 28, 1950, and during the period that the claim giving rise to the award was pending, it was neither the policy nor the practice of the Third Division to permit persons or organizations whose relationship to the controversy was like that of the Clerks' organization to intervene or to notify them of the pendency of hearing of such proceedings before the Board (R. 16). The Carrier was therefore not required to go through the useless procedure of petitioning the Board to bring in the Clerks, nor did the fact that the Clerks had actual knowledge of the pendency of the controversy relieve the Board from complying with the requirements of Section 3, First (j).

Prior to September 6, 1951, the Third Division of the Adjustment Board had consistently refused to notify parties involved in a dispute submitted to the Board unless they were parties to the submission. On that date, in *Third Division Award No. 5432*, Referee Parker, speaking for the Board in *Order of Railroad Telegraphers v. Reading Company*, said:

> "From what has been heretofore related, it becomes apparent the established law of the land now is that the provisions of Section 3, First (j), supra, require that notice be given to the Clerks' Organization under the existing facts and circumstances of the case now before us. This Board is no greater than the source of its creation. When that source gave the courts power to set aside its orders and that authority is exercised in the manner above indicated we not only have the right but it becomes our duty to adopt and

follow a practice which the courts definitely indicate will give validity to what are now held by them to be invalid awards. With the rule so well established to hold otherwise can only result in unnecessary waste of time and useless expenditure of funds on the part of the employes, the carriers and the Board. Therefore we bow to the inevitable and, notwithstanding what may be found to the contrary in any of our previous awards, hold that this case cannot now be heard on its merits because it appears from the records that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, representing employes having rights that might be affected by our decision, were not served with notice of the filing of the claim and given an opportunity to be present and heard throughout all stages of the proceedings. In such a situation, the proper procedure in our opinion is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future."

It remained for Referee Lloyd H. Bailor, in *Fourth Division Award No.* 918 to attempt to summarize the situation. He states:

"Board awards on the third party question have concerned factual situations where the alleged third party, while also an employe of the respondent carrier, is in a different craft or class and hence is covered by a separate agreement. As previously indicated, such alleged third party may be under the jurisdiction of the same or of a different Division of the Board. Illustrative of awards holding third party notice to be required where the alleged third party is subject to the same Division's jurisdiction are Third Division Awards 5432 (Parker, Referee) and 5599 (Robertson, Referee). Among awards holding to the contrary under this type of factual situation are Third

Division Awards 2253 (Swain, Referee) and 5785 (Wenke, Referee). In circumstances where the alleged third party is under the jurisdiction of another Board Division the awards have also been conflicting, those holding that notice is required being illustrated by Third Division Award 5751 (Munro, Referee) and First Division Award 14475 (Weeks, Referee). Contrary holdings under the same factual situation are exemplified by Third Division Awards 5702 (Wenke, Referee), 6203 (Shake, Referee), and Second Division Award 1628 (Carter, Referee)."

* * * * * * *

"No purpose would be served in debating this question. It is difficult to believe that the various courts that have ruled on the third party issue as above noted have been entirely unmindful of the limited jurisdiction aspect. Nor can we see the wisdom of pursuing a policy in direct contradiction to the Railway Labor Act as interpreted by the branch of the Federal Government specifically authorized by Congress to review actions of the Board under conditions set forth in the Act. We think the Board is compelled to deem as 'involved' all employes of a respondent carrier, regardless of craft or class, whose present job status may possibly be affected adversely by an order issued pursuant to an award in a given proceeding.

"Moreover, we are of the opinion that this procedure is made necessary even though the alleged third party comes within the jurisdiction of a Board Division other than the one before which the claim is properly filed. This conclusion naturally flows from the reasoning found in the above cited decisions. If the Fifth Amendment requires notice to an employe who may be deprived of his job although he is covered by a different agreement, notwithstanding the Board's 'limited jurisdiction' with respect to interpreting the agree-

ment under which the claim is filed, then we cannot see that the separation of jurisdiction among the several Board Divisions can nullify the mandate imposed by this Amendment as the Courts interpret it. Clearly the Railway Labor Act, from which the Board derives its authority, is subordinate to the provisions of the Constitution."

It is apparent from the foregoing that the giving of notice to involved parties is comparatively simple where, as in the case at bar, the conflicting crafts fall under the same division of the Board. It is also apparent that in many instances, crafts falling under different Divisions of the Board have been given opportunity to be heard in the same proceeding. The Board has authority to formulate its own rules of procedure, and if its members were of a mind to do so, it would certainly be feasible for some workable procedure to be formulated.

## THE ISSUE.

The issue now raised by the petition for certiorari is whether, in the light of the factual findings, the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court."

## QUESTIONS PRESENTED.

Five questions are presented by Petitioner (Petitioner's Brief, pp. 2-3):

(1) The first question is deficient in that the claim presented to the Board by the Telegraphers in the case at bar was not merely that the Carrier had violated a collective bargaining agreement, but the Telegraphers also sought the taking of the work from a member of the Clerks' organization and the restoring of said work to a member of the Telegraphers' organization. The Clerks were "involved"

for this latter reason and not because of a mere alleged wrongful interpretation of the Telegraphers' agreement. We will discuss this under the heading, *"Requirements of Section 3, First (j) of the Railway Labor Act."*

(2) The second question presents whether actual knowledge of the proceedings by the Clerks satisfied the requirement of notice to involved parties. This does not properly present the issue. The District Court in his Third Conclusion of Law found (Rec. p. 26):

> "Neither formal notice nor actual knowledge, without opportunity to be heard, fulfills the purpose of the statute."

We will discuss this later in the brief under the heading, *"Notice Without Opportunity to Be Heard Is Not Sufficient."*

(3) The third question propounded by petitioner is whether failure of the Board to give such notice renders any award void. If notice is required and not given, certainly the award is unenforceable.

(4) The fourth question presented by petitioner is whether the Carrier may challenge the validity of the award for lack of notice to other involved parties. We will brief this under the heading, *"The Carrier Can Raise the Issues Here Presented."*

(5) The fifth question raises the issue as to whether suit of the Telegraphers should be dismissed because of their failure or refusal to bring in the Clerks as indispensable parties. This will be discussed under the heading, *"The Clerks Are Indispensable Parties."*

## ARGUMENT.

Our present discussion of the foregoing problems will be confined to a consideration of whether important questions of federal law which should be settled by this Court are raised under the facts in this case.

### Requirements of Section 3, First (j) of the Railway Labor Act.

Section 3, First (j), of the Railway Labor Act (Title 45, U. S. C. 153) provides:

> "* * * the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers *involved in any disputes submitted to them.*"

"Involved parties" do not become "parties to the dispute" until they have been brought into the proceedings before the Board. There can be no doubt, however, that the Clerks were "involved" in this controversy in which the Telegraphers sought to take the clerical work in question from the Clerks and restore it to the Telegraphers.

The claim of the Telegraphers is thus summarized in the concluding paragraph of their submission to the Board appearing on page 19 of Award No. 4734 (R. p. 9 et seq.), to-wit:

> "It is the claim of the Employees, based on these facts, that the position of star agent shall be restored and *all of the clerical work formerly performed by the star agent*, which was improperly removed, *shall be restored to the position* and the former incumbent restored thereto." (Emphasis added.)

In paragraph 8 of the Telegraphers' Complaint in the case at bar, it is alleged that "the plaintiff made claim on

the defendant that the positions of star (*) agent and first trick telegrapher *and the work belonging thereto* be restored * * *." (Emphasis added.)

The Courts below were therefore correct in stating that "both organizations claim the clerical work in controversy and not merely pay for the work performed" (Rec. p. 25).

Both of the Courts further fortified their findings that the Clerks were involved parties by reference to the decision of this Court in *Order of Railway Conductors v. Pitney*, 326 U. S. 361, 367, wherein the Court said (Appendix, Petitioner's Brief, pp. 9a-10a):

> "* * * interpretation of these contracts involves more than a mere construction of a 'document' in terms of ordinary meaning of words and their position. * * * For O. R. C.'s agreement with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and customer, that, too, must be taken into account and properly understood."

The difficult questions referred to in *Whitehouse v. Illinois Central*, 349 U. S. 366, 372, have not yet arisen in this case. Not until the Clerks, as involved parties, be given notice with opportunity to be heard, will the following controversial issues be raised, to-wit: (a) would there be any estoppel against the Clerks should they fail to avail themselves of the opportunity to be heard and to assert their contentions; and (b) if the Clerks appeared, would the Board's award respecting the jurisdictional controversy in question be binding upon the Clerks as well as upon the parties to the submission.

These questions are not in the present case, and therefore their importance does not present a reason for the granting of certiorari.

Accepting the factual findings of the two lower courts as controlling, the only question at issue is whether the Clerks were "involved" in the submission by the Telegraphers seeking to have the clerical work taken away from the Clerks and restored to the Telegraphers. If the Clerks were so involved, as the facts clearly indicate they were, the notice to them as involved parties was prerequisite to a vaild award. Even if the Board had no power to go further than indicated in the above quotation from *Order of Railway Conductors v. Pitney*, such notice to the Clerks as involved parties was required.

We respectfully submit that the requirements respecting the serving of notice on involved parties with opportunity to be heard does not of itself raise an issue of such importance as to warrant the granting of certiorari. It is not until after the lower court has had an opportunity to rule on the actions of the involved parties taken after notice by the Board with opportunity to be heard, that this Court can weigh the importance of the decision of the lower court on the issues then presented and can determine what it should do respecting the granting of certiorari. This Court obviously cannot surmise what might have been done had notice to involved parties been given and then proceed to pass upon the validity of such assumed transactions.

**Notice Without Opportunity to Be Heard Is Not Sufficient.**

The District Court, in his third Conclusion of Law, found (R. 26):

> "Neither formal notice nor actual knowledge, without opportunity to be heard, fulfills the purpose of the statute."

In support of their argument that actual notice is sufficient (Brief p. 22), counsel for appellant rely upon language in *Estes v. Union Terminal Co.*, 89 Fed. 2d 768;

*Hunter v. A. T. & S. F. R. Co.*, 188 Fed 2d 294; and *Kirby v. Penn. R. Co.*, 188 Fed. 2d 793. Those cases were decided before it was established that the Board would hear only persons who received formal notice from it. Moreover, in those cases the courts recognized that those receiving actual notice should be allowed to participate in the proceeding and assumed that such persons would be afforded that right by the Board. For example, in the *Kirby* case the Court stated (188 Fed. 2d 798) that employees involved are "entitled to notice and an opportunity to be heard before the Adjustment Board." Similar statements are found in the *Estes* case (89 Fed. 2d 768, 779, 771) and the *Hunter* case (188 F. 2d 294, 301).

Later the courts became aware that the Board with conscious indifference and complete disregard for the numerous decisions of the Federal Courts had effectuated a custom and practice of denying persons having "actual notice" the right to participate in proceedings before it. One of the first cases to consider this question was *Allain v. Tummon*, 212 F. 2d 32. In that case, the Court held that the "actual notice" rule should be abandoned in view of such policy of the Board. In this connection, the Court said (pp. 35-36):

> "It was established herein that had the plaintiffs or their union obtained the knowledge that the claim of the dining car stewards was pending before the Board, they would not have been permitted to file a written submission, offer testimony, cross-examine witnesses, make an argument, or otherwise participate in the hearing. It is thus apparent that a statement in our opinion in the second *Hunter* case is no longer applicable. In that case we said, 188 F. 2d 294, 301: 'We hold that all plaintiffs who were or could be adversely affected by the order and award were entitled to notice under the statute. Actual notice of the hearings for sufficient period prior thereto to permit

> plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity and any plaintiff who had actual notice of the hearings, or authorized the Santa Fe to represent him thereat, is estopped from relying on the Board's failure to serve formal notice thereof upon him.'
>
> "Although we indicated in that opinion that actual notice of the hearing for a sufficient period prior thereto to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them nothing. Notice without the opportunity to be heard does not satisfy the requirements of due process."

That notice of a hearing without opportunity to be heard would be futile is no such new announcement of the law as to warrant the granting of certiorari. As far back as *Windsor v. McVeigh*, 93 U. S. 274, 277-278, Mr. Justice Field said:

> "* * * Notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: Appear and you shall be heard; and, when he has appeared, saying: Your appearance shall not be recognized, and you shall not be heard."

The second "question presented" on page 2 of Petitioner's Brief does not therefore present a new and important question of federal law which needs to be settled by this Court.

**The Carrier Can Raise the Issues Here Presented.**

The Carrier as well as the Clerks has a vital interest in the adjudication of conflicting claims to clerical station work, and is, therefore, entitled to have enforced the requirements of Section 3, First (j) of the Railway Labor Act. It can give the work to only one craft. It should not be confronted, as in the case at bar, with conflicting separate awards in favor of both crafts. As said by the Court of Appeals of the Seventh Circuit in *Allain v. Tummon et al.*, 212 Fed. 2d 32:

> "We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies."

In *Kirby v. Penn. R. Co.*, 188 Fed. 2d 793, 798-799, the Court of Appeals of the Third Circuit, to the same effect, said:

> "If the Carrier is not permitted to raise the question of notice to employees, it is in a dilemma in deciding whether to comply with the Board order. If it complies it may be exposed to suit by the ousted employees for back pay and reinstatement. If it refuses to comply it may increase the amount of back pay owed the claimants. Either way it runs the risk of paying two groups of employees for the same work.
>
> * * * * * * *
>
> "We conclude that defendant Carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies."

In *Railroad Yardmasters v. Indiana Harbor Belt R. Co.*, 166 Fed. 2d 326, 331, the Seventh Circuit Court of Appeals said:

> "It also seems reasonable to think that the defendant was entitled to an order which would protect it in the event of compliance. What authority did it have to demote Baker when he was not a party to the proceeding and was not named as an employee to be deprived of his seniority?"

The implied ruling of the lower court that the carrier in the case at bar was therefore a proper party to object to the Board's failure to comply with the notice requirement of Section 3, First (j), does not present an important question of federal law which needs to be settled by this Court.

**Clerks Are Indispensable Parties.**

The Court of Appeals in the decision here sought to be reviewed had the following to say with respect to the necessity of bringing in the Clerks as indispensable parties (Appendix to Petitioner's Brief, pp. 14a-15a):

> "It is contended here for the carrier appellee that the judgment of dismissal appealed from should be sustained on the further ground, not passed on below, 'that said Award (No. 4734) is unenforceable for want of indispensable parties in this pending court proceeding.'
>
> "The point has been briefed for the parties pro and con and we express our conclusion that the contention should be sustained. Enforcement of Award No. 4734 prayed for in the plaintiff's complaint in this suit would necessarily include the issuance by the Federal Court of a mandate requiring the defendant carrier to dispossess a clerk now in its employ of his job. The Clerk's claim of right to the job has been determined by an Award of the Board and his interest in the suit

to dispossess him of it is real and obvious. Yet neither he nor his union has been made a party to this suit and the object of the suit is to have the Court dispossess him without hearing him.

"The subsection (p) under which this action was brought provides 'Such suit in the District Court shall proceed in all respects as other civil suits * * *' (with certain exceptions not here relevant). It is well settled that a Federal Court will not proceed to final decision of a controversy brought before it without the presence of all 'who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' *Shields v. Barrow*, 58 U. S. 129, l. c. 139; *Wesson v. Crain*, 8th Cir., 165 F. 2d 6, l. c. 9, and cases cited. Rule 19 of the Rules of Civil Procedure has not modified the requirement as to indispensable parties. *Wesson v. Crain*, supra, and the undisputed facts in this case demonstrate that the Clerks are indispensable parties without whose presence justice cannot be done.

"It is argued for the carrier that in consequence of the indispensability of the Clerks to a just determination of the complaint herein and the consequent duty of the plaintiff to bring them in as parties, the controversy between the Telegraphers and the Clerks as to the right to the jobs in question becomes justiciable. We confine our decision on the question of necessary parties to the holding that the judgment of dismissal of the plaintiff's case was justified by the lack of indispensable parties defendant, to-wit, Clerks."

Here it is apparent from the language quoted the decision of the lower court went no further than to hold that the Clerks whose jobs were sought to be taken away from

them were indispensable parties. To this extent the opinion raises no question that is so unusual or of such public interest as to necessitate a review by this Court. If the Telegraphers had elected to bring in the Clerks as indispensable parties, a more complicated situation would have been presented. The Court must then have determined whether, with two conflicting decisions of the Adjustment Board, one in favor of the Clerks and the other in favor of the Telegraphers, this jurisdictional controversy continued to be non-justiciable, and if so, whether it was the duty of the court to dismiss the suit brought by the Telegraphers for the enforcement of the award in their favor. In other words, with the Clerks brought into the case, the Court of Appeals would have been forced to answer some of the questions raised in *Whitehouse v. Illinois Central*, 349 U. S. 366, 372. In its second affirmative defense (R. p. 11), and at the very inception of the case (R. p. 15), the Carrier objected to the proceedings in the absence of the Clerks, and at that time the Telegraphers made it clear that they would not seek to have the Clerks made parties. This greatly simplified the issue to be determined by the Court of Appeals and made it unnecessary for that court to decide what action would have been taken had the Telegraphers elected to bring the Clerks into the case.

In the light of the conflicting decisions of the Adjustment Board, we are personally of the opinion that a justiciable controversy would have been presented, but the action taken by the Telegraphers made a decision on this point unnecessary. Under the circumstances there is nothing in this phase of the case to require review by this Court.

## CONCLUSION.

As a famous Missouri editor once said: "I am an old man and have had many troubles, most of which never occurred." It is so with the perplexing questions that

might have arisen, but which actually did not arise in the presentation of this case. Dealing with these perplexing questions, which are here conspicuous by their absence, this Court in *Whitehouse v. Illinois Central*, 349 U. S. 366, 372, said: "Their difficulty admonishes us to observe the wise limitations on our own function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case."

The propriety of that suggestion cannot be questioned, and when applied to the case at bar would make the granting of a writ of certiorari improvident.

Respectfully submitted,

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